

In the
Supreme Court of Ohio

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| THE OHIO ACADEMY OF NURSING HOMES, et al., | : | Case No. 2006-0275 |
| | : | |
| Plaintiffs-Appellants, | : | On Appeal from the |
| | : | Franklin County |
| v. | : | Court of Appeals, |
| | : | Tenth Appellate District |
| | : | |
| THE OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, et al., | : | Court of Appeals Case |
| | : | No. 05AP-562 |
| | : | |
| Defendants-Appellees. | : | |

**DEFENDANTS-APPELLEES'
MEMORANDUM OPPOSING MOTION FOR RECONSIDERATION**

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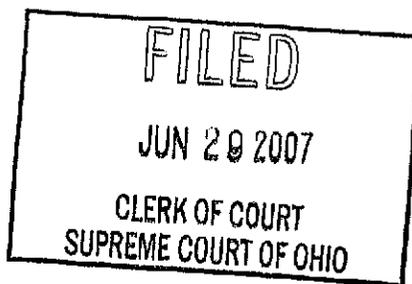
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INTRODUCTION

The Court should deny the Motion for Reconsideration filed by Appellants (“the Nursing Homes”). The Nursing Homes have not presented any sound basis for reversing the decision, as each of their claims is either incorrect or irrelevant.

The Nursing Homes ask the Court to reconsider its alleged holding that a party always “must file two distinct mandamus actions” when challenging an agency’s nonappealable, discretionary decision. According to the Nursing Homes, the Court’s decision “is directly contrary to an explicit legislative pronouncement regarding the Declaratory Judgment Act” and “creates an unworkable burden that effectively denies judicial challenge of state agency actions.” See Motion at 2. More specifically, the Nursing Homes insist that having a two-step process is inefficient and contrary to the declaratory-judgment statutes; that the Court has “for all practical purposes” set up a “three-step process”; and that the Court’s decision will necessarily create statute-of-limitations problems. The Nursing Homes are wrong on all three counts.

A. The Court did not set up a two-step process; it merely recognized that this particular case may properly require two steps because the Nursing Homes might disagree with two separate agency decisions.

The Court did not “create” the two-step process that this matter may ultimately require, and in fact, such a two-step process will rarely occur, or perhaps never occur, in cases other than this unique (and since-amended) process regarding certain payments to certain Medicaid providers. The Court did not change mandamus law generally.

The Court merely recognized that, when faced with a Medicaid provider’s request for a government-mandate rate adjustment, ODJFS may conclude that the legal prerequisite—the existence of a government mandate—is absent. If ODJFS finds that no mandate exists, it stops there; of course it does not go on to decide how much monetary relief to grant. That logical result is the reason that, in *some* cases, a party may have to go to court to first obtain relief on that

point. Then, if it obtains relief, and ODJFS exercises discretion in setting the amount of any monetary relief, the party may have to go to court again. But that two-step process is nothing that the Court created as a matter of mandamus law; it is the outgrowth of the substantive law here, which gives ODJFS discretion over both (1) whether a mandate exists and (2) how much monetary relief to give, if any.

That “two-step” process cannot possibly be avoided, unless the Court were to override the substantive law on the “amount of relief” issue, and adopt the radical position that the amount-of-relief issue could be decided by *courts*, not ODJFS, in the first instance, as long as a party is already in court on step one. That is, the Court would have to hold that whenever ODJFS finds that a government mandate does not exist at all, the disappointed party could go to court, obtain a court decision saying that a mandate does exist, and then—in the name of purported efficiency—have the court go on to be the first to address a very complex Medicaid financial issue that is supposed to be committed by law to agency discretion.

That cannot be right, and the Court did not err in avoiding that path. Indeed, even if the Court somehow had initially agreed with the Nursing Homes that declaratory judgment, and not mandamus, was an appropriate vehicle to override ODJFS’s decision regarding the *existence* of a government mandate, it would still have been grievously wrong to extend that holding yet another step to allow courts to address the *amount of relief* issue before ODJFS has even weighed in. The Court was right not to do so, and it should not do so now.¹

¹ The Nursing Homes seem to suggest that the partly-dissenting opinion of Justices Lanzinger and Lundberg Stratton supports their view, but to the extent that the Nursing Homes extend that support to the “two-step” issue, they are wrong. That partly-dissenting opinion does disagree with the majority on whether mandamus is the sole relief available for the “step one” case, regarding the existence of a government mandate, but nothing in the opinion suggests that those Justices would allow a court hearing such a case to go straight to step two and address the amount-of-relief issue. Furthermore, those Justices agree that, if a government mandate is found

And again, not only is the Nursing Homes' alternative wrong, but the two-step path that they describe as so onerous will happen here only if three conditions are met: (1) the Nursing Homes prevail on the question of whether a government mandate exists; (2) they ultimately disagree with the agency's decision regarding monetary relief; and (3) they decide to sue again. It is certainly not *necessarily* a two-step process. Nor does every situation involve a separate, threshold issue. For example, in *Morning View Care Center—Fulton v. Ohio Department of Job and Family Services*, Case No. 05AP-1235 (a re-filed action currently pending before the Tenth District, stayed for this case,² and involving the same counsel as this case), a Medicaid Provider asked ODJFS for a rate reconsideration due to claimed "extreme hardship," and ODJFS partly granted the request. See *Morning View Care Ctr.—Fulton v. Ohio Dept. of Job and Family Servs.* (10th Dist.), 148 Ohio App. 3d 518, 2002-Ohio-2878, ¶¶ 8-9. The provider sued, claiming that the amount awarded was the product of an abuse of discretion by ODJFS. Such a case may be properly resolved in a *single* mandamus action.

Moreover, two-step litigation—even in mandamus—is not remarkable. If an agency or official makes a threshold legal determination that stops a process, obviously that question must first be settled (if there is a challenge) before the agency will proceed further. The Court has seen such mandamus cases before. See, e.g., *State ex rel. Griffith v. Indus. Comm'n*, 109 Ohio St.3d

to exist, "the amount of any rate adjustment would be a discretionary act subject to challenge via a mandamus action."

² The Nursing Homes incorrectly state that two common pleas court cases are stayed pending the outcome of this case. See Motion at 4, n. 1, citing *Willow Park Convalescent Home v. Ohio Department of Job and Family Services*, Case No. 06CV07-10175, and *Harding Pointe, Inc. v. Ohio Department of Job and Family Services*, Case No. 07CVH01-150. But neither of these cases is (or has been) stayed for this case. Both are currently active. Perhaps the Nursing Homes are confusing these two cases with two cases currently before the Tenth District that were stayed for this case: the *Morning View* case mentioned above and a second case, *Arcadia Acres, Inc. v. Ohio Department of Job and Family Services*, Case No. 06AP-738.

479, 2006-Ohio-2992, ¶¶ 6, 13-15 (affirming the appeals court's award of a writ of mandamus based on a finding of an abuse of discretion, and ordering the Commission to reconsider certain issues and issue an amended order); *State ex rel. Moss v. Ohio State Highway Patrol Ret. Sys.*, 97 Ohio St.3d 198, 2002-Ohio-5806, ¶¶ 6, 24 (construing a statute and affirming the issuance of a writ ordering the retirement board to vacate its order refusing to consider an application and to conduct further proceedings to determine the applicant's eligibility for benefits). In both of these cases a first step occurred, and in both cases the Court resolved the immediate issue, which was a threshold question that had previously ended the agency's proceedings. In both cases, the Court ordered an agency to *further* exercise discretion in light of the resolution of the first step. So in both cases, if the party wished to challenge the agency's eventual (second) decision, the party would have to file a second mandamus action.

The Nursing Homes are also mistaken in insisting that their view is supported by the declaratory judgment statute's provisions allowing for "further relief." The Nursing Homes claims that such "further relief" could include a writ of mandamus to enforce a declaratory judgment and thereby eliminate the need for "separate actions." See Motion at 4-5. The Nursing Homes even claim that this was the "exact relief" they sought in this case. See *id.* But a review of the Second Amended Complaint shows that they asked for a writ as an *alternative* to a declaratory judgment, not as a means of enforcing a declaratory judgment. See Sec. Am. Compl. at 13. Moreover, such "further relief" would obviate the need for a separate action only where a declaratory judgment and a writ to enforce it would work to resolve the entire dispute, which is not the case here. In this case, first, the issue of the existence of a government mandate will have to be determined in court (because the parties disagree on that threshold issue), and only then—if the Nursing Homes prevail and after ODJFS exercises discretion regarding monetary relief—can

there be an action addressing any alleged abuse of discretion in that relief determination. This case could not be definitely restricted to only one step, no matter what vehicle is used.

In sum, the Court's decision does not mandate that all mandamus actions challenging nonappealable, discretionary agency decisions will require two steps, as the Nursing Homes claim. The simple rule is that a party may sue an agency only for a decision or action already taken. Nothing about the *type of vehicle* (mandamus or declaratory judgment) has any effect on this analysis—it could still require as many “steps” as there are sequential agency decisions or actions that a complaining party wishes to challenge. Because two possible steps are anticipated in this case, the Court articulated its reasoning within that context.

B. The Court did not set up a “three-step process,” either.

The Nursing Homes are also wrong in protesting that the Court's decision “sets up for all practical purposes a ‘three-step process.’” See Motion at 2. From now on, the theory goes, a party—before beginning a potential two-step process—must first determine whether the agency's decision is discretionary and nonappealable (such that it can be remedied only in mandamus). See *id.* at 2-3. But this is not an additional “step.” Parties “decide what to do,” before doing it, every day. Even if, as the Nursing Homes suggest, it is sometimes unclear to a complaining party whether an agency's decision is discretionary, that party can challenge the decision by asking a court for declaratory relief or, in the alternative, a writ of mandamus. The court could then decide whether agency discretion was involved and, if so, deny declaratory relief and proceed to decide—in mandamus—the substantive question(s) presented.

In fact, this is essentially what happened in this case. The Nursing Homes brought this action in these same two alternative vehicles (although they did so because they wondered about the proper vehicle, not about ODJFS's discretion). The court of appeals determined that (1) ODJFS had discretion with respect to government-mandate requests; (2) therefore, the Nursing

Homes' request for declaratory relief had to be dismissed for lack of jurisdiction because mandamus is the sole proper vehicle for such agency decisions; and (3) the case should return to the lower court to proceed in mandamus on the initial question of the existence of a "government mandate." These two issues, then—whether agency discretion is involved and whether there is a government mandate—are both properly addressed in the first "step," contrary to the Nursing Homes' claims. See Motion at 2-3. After that, if the Nursing Homes prevail on the government-mandate question, and if they are dissatisfied with the consequent relief awarded by ODJFS, they can bring a "step two" action in mandamus and claim an abuse of discretion. No third step exists in this process.

Moreover, the Nursing Homes have never raised this "three-step" argument before now, even though they could have made this same argument to both lower courts. They did not even raise it in their merits briefs to this Court. The Nursing Homes therefore waived this argument, and this Court should not entertain it now.

C. The Court's decision does not create any statute-of-limitations problems.

The Nursing Homes are equally mistaken in raising the alarmist assertion that, "[b]y mandating a multi-step process[,] this Court virtually guarantees application of the statute of limitations to preclude any challenge to a state agency's discretionary, nonappealable decision." See Motion at 3-4. Also, according to the Nursing Homes, more parties will now file mandamus actions originally in this Court so as to "cut off the years of appeals," which will be "overwhelming to this Court." The Nursing Homes are raising this statute-of-limitations argument for the first time in their Motion for Reconsideration, and it is not based on any new information, so it should be rejected for that reason alone.

Further, this theory defies both logic and experience. First, appeals (when necessary, and they are not always necessary) do not cause statute-of-limitation problems, no matter how long

they take. If an action on a claim is timely brought, the statute of limitations does not run to preclude relief during any appeal in that action. Second, the Nursing Homes start with a statute of limitations that applies to *liability* cases, see Motion at 3, and they do not explain how that would apply to mandamus at all, as mandamus is aimed at ordering a state official to take a current act, not to pay damages for a liability caused years ago. Third, to the extent that the Nursing Homes are warning that “step one” might take so long that “step two” could not be brought within some particular statute of limitations, they are plainly wrong, as the clock would not even start ticking on the second agency decision until the agency actually *made* the second decision—which would not be until *after step one was concluded*. So the Nursing Homes’ concern about time running out is misplaced.

This case perfectly illustrates why the Nursing Homes are wrongly imagining a statute-of-limitations problem. The Nursing Homes may ultimately challenge two decisions by ODJFS in relation to their government-mandate request, which is why the Court characterized it as potentially a two-step process. First, ODJFS decided that there was no government mandate. The Nursing Homes then challenged that decision in court. They did so within several months of ODJFS’s decision, and this action is still alive. Indeed, the Tenth District (before this Court’s review) had already ordered, in remanding the case to the trial court, that the Nursing Homes must be allowed to amend their Complaint to ask for appropriate “step one” relief. If they are able to now draft a valid complaint and otherwise prosecute their claims properly, there will be judicial resolution of whether ODJFS correctly decided that there was no government mandate.

Second, if the Nursing Homes ultimately prevail on the government-mandate question, ODJFS will then decide the appropriate relief to be awarded. That new decision will then be the new basis for a statute of limitations, if any. The date on which ODJFS issues its final decision

on relief is the date on which the statute of limitations for challenging *that* decision would begin to run. The length of time it took step one to be completed will not affect the statute of limitations that applies to that second ODJFS decision.

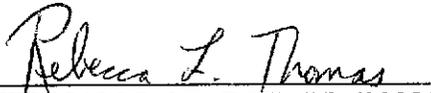
In short, nothing about this Court's decision even suggests, much less "virtually guarantees," any statute-of-limitations problem at all.

CONCLUSION

The Court should deny the Motion for Reconsideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Defendants-Appellees' Memorandum Opposing Motion for Reconsideration was served by regular U.S. mail on this 29th day of June 2007 on the following counsel:

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